

Virtually secured credit? Security rights in digital goods

Is it possible to use a Facebook account as collateral for a credit? This question seemed frivolous just a few years ago, but today it raises many doubts. Digital goods have become an essential part of the global economy. The market value of some digital goods even exceeds that of some real-world goods (including real estates). However, modern legal systems do not allow digital goods to be used fully as collateral. They are not protected like tangible things, and even if they are, it is not possible to "transfer" them (hand them over) under a classic instrument of pledge right (charge). This legal uncertainty deters lenders. No financial institution would decide to secure a loan with digital goods if it is not certain that it will be able to satisfy its claims in case of default. This can lead to many dangers. Digital goods will be used as collateral in an informal way, with the risk that holders of these digital goods will be disadvantaged or that various speculations will take place in the market (such as the one related to real estate mortgages that led to the global economic crisis in 2008).

The described problem has been recognised by some national legislators (e.g. in Serbian law, where in 2019 the Law on Digital Assets came into force, and which i.a. regulates the security rights in digital assets), or by some European legal communities (e.g. in 2022 the European Law Institute published the Model Rules defining the law applicable to contracts creating security interests in digital goods). However, the topic has not been sufficiently explored and the research project aims to contribute to filling this gap.

The subject of the project is to determine whether digital goods can serve as collateral for credit. This problem concerns the foundations of European property law. The existing rules and values specific to security rights will be referred to those specific to the virtual environment of the Internet. In other words, the task of the project is to reconcile these two – as it seems – quite different worlds.

The research will be conducted from a comparative legal and historical perspective. The regulations of European countries on pledge rights are sometimes diverse. A comparison of the various solutions accepted in the national legal systems will allow to obtain a wide range of forms of security rights (for example, fiduciary transfer; floating charge). Moreover, since the problems of the digital world require the construction of legal regulations from scratch, it is necessary to return to the roots of European private law. The current form of pledge rights is the result of a long development process. During this process, many forms of collateral have been abandoned or do not play the prominent role they did previously (for example, antichresis pledge, the Gordian's pledge). However, it is possible that they may experience a renaissance in the context of digital goods. These two perspectives will allow for the development of an optimal model of security rights in digital goods.

The research will analyze legal issues such as: which digital goods can serve as objects of security rights? Which forms of security rights are the most effective from the perspective of digital goods? How should a security right in a digital good be established (by 'factual transfer' of the digital good or registration of it in a public register)? How is the security right in digital goods to be enforced (is the judicial enforcement still relevant or is it necessary to distinguish cases of extrajudicial enforcement)? Which applicable law and which jurisdiction should apply to the creation, effects and enforcement of a security right in digital goods?

The key outcome of the planned research will be the preparation of the optimal model of rules for the security right in digital goods. This will contribute vastly to private law doctrine's development and may instigate further discussion on how the law should react to technological development. The results of the research may inspire the legislators and serve as source material in the process of introducing new laws or reinterpreting current ones dealing with security rights.